84-1531

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

ROBERT BERNARD JACKSON,
RESPONDENT

APPENDIX

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OPINION OF THE MICHIGAN COURT OF APPEALS

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

V

APRIL 5, 1982

ROBERT BERNARD JACKSON,
Defendant-Appellant.

Docket No. 51655

Before: Danhof, C.J., and J.H. Gillis and Bronson, JJ.

Danhof, C.J. Following a jury trial defendant was found guilty of murder in the second degree, MCL 750.317; MSA 28.549, and conspiracy to commit murder in the second degree, MCL 750.157a; MSA 28.354(1) and MCL 750.317; MSA 28.549. He was sentenced to two concurrent terms of life imprisonment. Defendant appeals as of right.

Defendant's conviction arose from the shooting death of Rothbe Elwood Perry.

Defendant and a codefendant, Mildred Perry, the victim's wife, were tried together by separate juries. Two other codefendants, Michael White and Chare (also known as Charles) Knight, had their cases severed from that of defendant.

I

DID THE TRIAL COURT ERR IN FINDING THAT DEFENDANT'S CONFESSIONS WERE VOLUNTARY AND ADMISSIBLE?

The record in the instant case indicates that on July 30, 1979, codefendant Chare Knight confessed to the crime and implicated defendant, who was arrested by the Detroit police that same day. On July 31, 1979, at approximately 2 p.m., defendant was transferred to the custody

of the Livonia police and transported to the Livonia Police Station. At approximately 3:30 p.m. defendant made his first oral confession. Defendant made tape recorded confessions at 5:52 p.m. and again at 8:48 p.m. because of the poor quality of the 5:52 p.m. tape recording. On August 1, 1979, at approximately 10:00 a.m., defendant took a polygraph exam and then made another oral confession. At 12:30 p.m. that same day defendant made a written confession. Defendant was arraigned at 4:30 p.m. on August 1, 1979. Defendant requested an attorney at the time of his arraignment. At approximately 10 a.m. on August 2, 1979, defendant made another confession.

A Walker[1] hearing was held prior to

[1] People v Walker (On Rehearing), 374 Mich 331; 132 NW2d 87 (1965).

trial. At the conclusion of the hearing, the court found that all of the incriminating statements made by defendant were voluntary and admissible.

Defendant initially argues that the trial court should have suppressed his confessions made prior to arraignment because the delay in arraigning defendant was used to exert psychological pressure and to extract his confession.

Unnecessary delay between arrest and arraignment is prohibited by MCL 764.26; MSA 28.885. However, this statute does not automatically require suppression of an incriminating statement where there has been a delay between arrest and arraignment. People v Ewing (On Remand), 102 MichApp 81, 85; 300 NW2d 742 (1980). See also People v Hamilton, 359 Mich 410,

416-417; 102 NW2d 738 (1960). Rather, an incriminating statement should only be used as a tool to extract the statement. People v White, 392 Mich 404, 424; 221 NW2d 357 (1974), People v Antonio Johnson, 85 MichApp 247; 271 NW2d 177 (1978).

Upon review of the testimony presented at the Walker hearing, we are not persuaded that the delay between's arrest and arraignment was used to extract a confession. During this time period, each of the questioning sessions was preceded by Miranda[2] warnings and, if the testimony of the officers present during the sessions is believed, defendant volunteered his statements. Since we do not possess a definite and firm conviction

[2] Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

that the trial court erred in finding that defendant's statements were voluntary and admissible, that determination is affirmed. People v McGillen #1, 392 Mich 251, 257; 22 NW2d 677 (1974).

Defendant next argues that his August 2, 1979, confession should have been suppressed because counsel was not present at that confession even though defendant had requested counsel at his arraignment. Defendant acknowledges that Miranda warnings were given before the August 2, 1979, confession but asserts that these warnings were not sufficient to establish a knowing and intelligent waiver.

An almost identical fact situation was addressed in People v Bladel, 106 MichApp 397; 308 NW2d 230 (1981). After extensively reviewing the law in this area,

Bladel held that the question of a knowledgeable and voluntary waiver after the right to counsel has once been asserted requires a review of the individual circumstances of the particular case, with the prosecution carrying a heavy burden in proving that defendant's waiver was knowledgeable and voluntary. See also People v Parker, 84 MichApp 447; 269 NW2d 635 (1978). Applying this standard to the instant case, we would find that the prosecution has established a knowledgeable and voluntary waiver of defendant's right to counsel on August 2, 1979.

However, the Supreme Court's recent decision in People v Paintman, 412 Mich 518; 315 NW2d 418 (1982), requires us to reexamine the appropriateness of applying the standards set out in Bladel to the facts of the instant case.

Paintman involved the consolidated appeals of two defendants, Paintman and Conklin. Both Paintman and Conklin requested counsel when questioned by police following their arrest. They again asked for attorneys when arraigned. Paintman's incriminating statement was made, apparently, three days after his arraignment. Conklin's incriminating statement was made nine days after his arrest and initial request for counsel and seven days after his arraignment. Officers were aware at the time Conklin made his statement that he was represented by counsel, but did not contact his attorney. The Court described some of the pressures on the defendants as follows:

> "Paintman was an admitted heroin addict with a $60 to $80 daily habit. He suffered withdrawal

symptoms in the days preceding his statement. He was the target of derisive comments such as "baby killer" from both inmates and jail personnel because one of his alleged victims was a young child. There also was testimony about Paintman's suicidal mood. Further***Paintman told jail personnel prior to making his statement that he didn't wish to talk with police. That desire was answered by detectives appearing at the jail later in the day.

"Conklin was placed in a line-up the day after his arrest and spent most of his time in solitary confinement following his request for an attorney. He was taken out of the maximum security area after he confessed." Id., 527-528.

Relying on Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), which had a fact situation similar to that in Paintman, the Court held Paintman's and Conklin's statements should have been suppressed since those statements were taken in violation of Miranda. In reaching this decision the Court cited the following passage from Edwards:

> "'[A]n accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.' Id. (Emphasis

> added.)" Paintman, supra, 525.

The Paintman Court went on to state:

> "The Edwards Court emphasized, and we hold, that it is inconsistent with Miranda and its progeny for authorities to instigate a reinterrogation of an accused in custody who has clearly asserted the right to counsel. There is little doubt that both Paintman and Conklin clearly asserted their rights to counsel. In fact, their resistance to questioning continued unabated for a period of days.
>
> "In Conklin's case, authorities were not only aware that he had requested counsel, but that counsel had been appointed and had filed an appearance. In Paintman's case, he

first indicated his desire to speak with an attorney in response to a direct question by the chief assistant prosecutor. The prosecutor then left, but police continued to talk with defendant.

"Of what significance is invocation of a cherished constitutional right if it is ignored by the hearer and, in fact, only seems to exacerbate the defendant's plight? As the time gap increases between the embracing of the right and its fulfillment, the certainty of its existence must surely dim." (Footnote deleted.) Paintman, supra, 529-530.

After carefully reviewing the facts of Edwards and Paintman, and the rationale

for those decisions, we conclude that they do not require suppression of defendant's August 2, 1979, confession. We think there is an important distinction between asking for an attorney when questioned by police, as was the case in Edwards and Paintman,[3] and asking for appointment of an attorney at arraignment, as was the situation in the instant case. This difference was pointed out by the court in Blasingame v Estelle, 604 F2d 893, 895-896 (CA 5, 1979), where it

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[3] We recognize that the defendants in Paintman asked for attorneys when questioned by police and at their arraignments. However, we view the reference to the request for appointment of counsel at arraignment as being a further indication that the defendants had clearly requested that they have counsel when dealing with the police. We do not view the reference to the fact that the defendants requested counsel at arraignment as standing for the principle that this request, alone, would bar the police from thereafter asking defendants if they wished to make any statements.

stated:

> "[S]ome defendants may well wish to have an attorney to represent them in legal proceedings, yet wish to assist the investigation by talking to an investigating officer without an attorney present. 'While the suspect has an absolute right to terminate station-house interrogation, he also has the prerogative to then and there answer questions, if that be his choice.' Nash [v Estelle, 597 F2d 513, 517 (CA 5, 1979)]. To hold that a request for appointment of an attorney at arraignment would bar an investigating officer from later finding out if defendant wishes to exercise this prerogative would transform the Miranda safeguards, among which

> is the right to obtain appointed counsel, 'into wholly irrational obstacles and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.' Michigan v Mosley, 423 US 96, 102; 96 S Ct 321, 326; 41 L Ed 2d 313 (1975).
>
> "Therefore, we hold that the request for an attorney at arraignment does not prevent subsequent station-house interrogation where the request at arraignment is not made in such a way as to effectively exercise the right to preclude any subsequent interrogation."

In the instant case defendant never requested counsel when questioned by the police. He only requested appointment of

counsel at his arraignment on the afternoon of August 1, 1979. However, this request for appointment of counsel was not made in such a way as to effectively exercise the right to preclude any subsequent interrogation. Rather, the circumstances surrounding defendant's request for counsel show it to have been unrelated to the Fifth Amendment right to confer with or have counsel present before answering any questions. Blasingame, supra. In this regard the instant case is distsinguishable from Paintman and Edwards. Because of this crucial distinction, we conclude that the trial court did not err in not suppressing defendant's August 2, 1979, statement.

II

BY WARNING A WITNESS ABOUT THE PENALTY FOR PERJURY, DID THE TRIAL COURT DENY DEFENDANT HIS RIGHT TO DUE PROCESS AND HIS RIGHT TO CONFRONT WITNESSES?

One of defendant's alleged coconspirators, Chare Knight, testified at defendant's preliminary examination. This testimony was given pursuant to a plea bargain. In return for Knight's preliminary examination testimony and a promise to testify at defendant's trial, Knight would be allowed to plead guilty to second-degree murder and the prosecutor would recommend a sentence of 10 to 15 years imprisonment. It was also agreed that should this deal "fall through" Knight's preliminary examination testi-

mony would not be used against him at any subsequent prosecution.

Just before Knight was to testify at defendant's trial, the prosecution was informed, for the first time, that Knight would invoke his Fifth Amendment privilege against self-incrimination and that he would move to withdraw his guilty plea, which had, by that time, been entered. Informed of these events, the trial court ruled that Knight's preliminary examination testimony could be read to the jury since Knight was not available as a witness.

On the next day of trial, the court was informed that Knight had again changed his mind and would testify. Knight's change of mind was communicated

to the trial court by his attorney. At this time, Knight's attorney informed the trial court that he could no longer ethically continue to represent Knight and, therefore, requested that he be allowed to withdraw.[4] At this point the trial court asked Knight if he wanted to waive his privilege against self-incrimination and testify. Knight responded affirmatively, and the trial court informed Knight that if he did testify anything he said could be used against him in a subsequent trial and that if he did not testify truthfully he could be subject to prosecution for perjury. After this colloquy Knight informed the trial court

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4 In People v Collier, 105 MichApp 46; 306 NW2d 387 (1981), we recognized that where defense counsel has prior knowledge that his client seeks to present perjured testimony, he may be required to withdraw from representing that client.

that he did not want to testify. Subsequently, Knight's preliminary examination testimony was read to the jury.

Relying primarily on Webb v Texas, 409 US 95; 93 S Ct 351; 34 L Ed 2d 330 (1972), defendant argues that his conviction must be set aside in that the trial court "threatened" Knight with perjury, drove him off the stand, and thereby denied defendant his right to confront and cross-examine a key witness.

Our review of the facts of Webb and the rationale for that decision lead us to conclude that no reversible error occurred in the instant case. The egregious harangue of the trial judge in Webb, which was obviously calculated to silence the defense witness, is not present in the instant case. Rather, here

the trial judge's remarks were designed not only to protect the integrity of the trial process but also to protect the interest of the witness.

We wish to emphasize that where a witness is singled out by the trial judge (or, for that matter, by the prosecution) and threatened so that he is effectively driven off the witness stand, error will have occurred. See Webb, supra, and People v Pena, 383 Mich 402; 175 NW2d 767 (1970). However, as the Supreme Court's decision in People v Wein, 382 Mich 588; 171 NW2d 439 (1969), and this Court's decision in People v Collier, 105 MichApp 46; 306 NW2d 387 (1981), indicate, a criminal trial will not be allowed to become a game wherein the truth is concealed with the assistance of the law. In the instant case, the trial judge, in

light of the strong possibility of perjured testimony being given by Knight, was under a duty to ensure the proper administration of justice and to conduct the trial in such way that the discovery of the truth and the application of the law could occur unhindered. Under the facts of this case, no error occurred in the trial judge's remarks to Knight.

III

WAS DEFENDANT DENIED HIS RIGHT TO CONFRONT AND CROSS-EXAMINE A PROSECUTION WITNESS BY VIRTUE OF THE FACT THAT THE WITNESS HAD UNDERGONE HYPNOSIS PRIOR TO TRIAL?

In the instant case, one prosecution witness testified that she had been

hypnotized. However, she also stated that she had given a number of statements to the police prior to being hypnotized and that all the statements made at trial were made prior to the hypnotic session. Defense counsel was given the opportunity to cross-examine this witness about the tentativeness of her recollections and was given the opportunity (which she waived) to present expert testimony.

In People v Gonzales, 108 MichApp 145; 310 NW2d 306 (1981), Iv gtd 412 Mich 870 (1981), this Court held that hypnosis has not received sufficient scientific recognition of reliability to allow the post-hypnotic recollections of witnesses to be introduced into evidence. However, this conclusion does not mean that a witness who has been hypnotized will automatically be barred from testifying. Rather,

such a witness will still be allowed to testify as to those relevant facts remembered prior to undergoing hypnosis, provided certain standards surrounding the hypnosis are met. Gonzales, supra, 159, fn8. See also People v Wallach, 110 MichApp 37; 312 NW2d 387 (1981). In reaching this conclusion, the Wallach Court rejected the exclusion of all testimony by hypnotized witnesses on the basis that reliability and the credibility of the witnesses' testimony could be put in proper perspective through diligent cross-examination and through expert testimony as to the potential effect hypnosis might have on one's ability to recall events.

Gonzales was decided after the trial in the instant case. Therefore, the trial court did not have the benefit of

that decision. Furthermore, it is impossible from the record to determine whether the standards for admission of testimony by a hypnotized witness had been met.

Although Gonzales did not address this issue, we find that the standards set forth in Gonzales have only prospective effect. For trials which occurred prior to the release date of Gonzales, or within 20 days after that decision was released, we hold that testimony concerning pre-hypnotic recollection is admissible to the extent that the trial court is left with a belief that the witness's testimony actually was remembered prior to the hypnosis. Applying this standard to the instant case, we find that the trial court justifiably could have concluded that the witness's testimony was

limited to pre-hypnotic recollections.

In any case, even assuming arguendo that the complained-of testimony was incorrectly admitted, reversible error did not occur. Any error that did occur in the admission of the complained-of testimony was harmless in light of the overwhelming evidence against defendant.

IV

DID THE TRIAL COURT'S INSTRUCTIONS ON REASONABLE DOUBT CONSTITUTE REVERSIBLE ERROR?

Citing People v Davies, 34 MichApp 19; 190 NW2d 694 (1971), as well as other cases, defendant argues that the trial court erroneously instructed the jury on the issue of reasonable doubt. Defendant

further contends that this instruction shifted the burden of proof.

The error in Davies was charging the jury that a reasonable doubt could not be based upon a lack of evidence or upon the unsatisfactory nature of the evidence. People v Smalls, 61 MichApp 53; 232 NW2d 298 (1975), People v Ames, 60 MichApp 168; 230 NW2d 360 (1975). No such instruction was given in the instant case.

Reading the jury instructions as a whole we find that defendant's assignments of error are without merit.

V

MUST DEFENDANT'S CONVICTION FOR CONSPIRACY TO COMMIT SECOND-DEGREE MURDER BE SET ASIDE BE-

CAUSE THERE IS NO OFFENSE KNOWN IN LAW AS CONSPIRACY TO COMMIT SECOND-DEGREE MURDER?

Without objection, the jury was instructed, inter alia, that defendant could be found guilty of conspiracy to commit murder in the first degree (as was charged in the information) or conspiracy to commit murder in the second degree. On appeal, defendant argues that this instruction was erroneous in that there is no such crime as conspiracy to commit second-degree murder. The gist of defendant's argument on appeal is that the crime of conspiracy involves an agreement between two or more persons to accomplish some criminal act. Since it is the absence of premeditation and deliberation which distinguishes second-degree murder from first-degree murder, defendant

argues that it is impossible for a jury to find that defendant engaged in the premeditated commission of a crime which must be accomplished without premeditation.

We agree with defendant's conclusion, and, while we generally will not address error purported upon instructions to which no objections were raised, we will consider this issue in order to prevent the occurence of manifest injustice. See People v Lytal, 96 MichApp 140, 163; 292 NW2d 498 (1980), Iv gtd 409 Mich 923 (1980).

Generally speaking, a criminal conspiracy is a mutual understanding or agreement between two or more persons, express or implied, to do or accomplish some criminal or unlawful act. People v

Atley, 392 Mich 298, 311; 220 NW2d 465 (1974). The requisite elements of the crime of conspiracy are met when the parties enter into the mutual agreement; no overt acts must be established. People v Scotts, 80 MichApp 1, 14; 263 NW2d 272 (1977). As a crime, conspiracy is separate and distinct from the substantive offense. People v Carter, 94 MichApp 501, 504-505; 290 NW2d 46 (1979). The statute on the crime of conspiracy punishes the "planning" of the substantive offense; the statute on the substantive offense punishes the actual commission of the crime. People v Hamp, 110 MichApp 92; 312 NW2d 175 (1981). Thus, in order to prove conspiracy to commit murder it is not necessary to prove that a murder actually occurred. However, it must be established that the conspirators had the specific intent to commit murder. People

v Boose, 109 MichApp 455, 470; 311 NW2d 390 (1981).

It is the separate nature of the crime of conspiracy from the substantive offense which recently led this Court in Hamp, supra, 103, to conclude the crime of conspiracy to commit second-degree murder is not a necessarily included lesser offense of the crime of conspiracy to commit first-degree murder. In reaching this conclusion the Court reasoned:

> "Since prior 'planning' and 'agreement' are necessary, mandatory requisite elements of the crime of conspiracy, we find it analytically consistent to 'plan' to commit first-degree murder but logically inconsistent to 'plan' to commit second-degree murder. To prove a

conspiracy to commit murder, it must be established that each of the conspirators have the intent required for murder and, to establish that intent, there must be foreknowledge of that intent. Foreknowledge and plan are compatible with the sutstantive crime of first-degree murder as both the crime of conspiracy and the crime of first-degree murder share elements of deliberation and premeditation. Prior planning denotes premeditation and deliberation. The elements of conspiracy, conversely, are incompatible and inconsistent with second-degree murder. One does not 'plan' to commit an 'unplanned' substantive crime. It is not 'absence' of the elements but the 'inconsistency' of

the elements which lead us to conclude that one conspires to commit first-degree murder but not second--degree murder."

Although Hamp did not specifically hold that the crime of conspiracy to commit second-degree murder is nonexistent, the rationale of that opinion leads us to such a conclusion. As did the panel in Hamp, we find the elements of conspiracy to be incompatible with the elements of second-degree murder. One does not plan to commit an unplanned substantive offense.

Approaching the issue from a somewhat different perspective, we also conclude that an agreement to assault could never be elevated to conspiracy to commit second-degree murder--even where the

assault does, in fact, result in the death of the victim. Where there is an agreement to assault, the conspiracy would be complete before any overt act occurred. If the assault resulted in an "unplanned" death, the conspirators could be found guilty of conspiracy to assault and of the substantive crime of second-degree murder where the requisite malice arose from the assault and the resultant death. This result is consistent with the following illustration:

> "[T]he fact that conspiracy requires an intent to achieve a certain objective means that individuals who have together committed a certain crime have not necessarily participated in a conpsiracy to commit that crime. To take the example given by the Model Penal Code

> draftsmen, assume that two persons plan to destroy a building by detonating a bomb, though they know and believe that there are inhabitants in the building who will be killed by the explosion. If they do destroy the building and persons are killed, they are guilty of murder, but this is because murder may be committed other than with an intent-to-kill mental state. Their plan constitutes a conspiracy to destroy the building, but not a conspiracy to kill the inhabitants, for they did not intend the latter result." (Footnotes omitted.) LaFave & Scott, Handbook on Criminal Law (1972), pp 465-466.

In light of the above, defendant in the instant case could not have been

found guilty of conspiracy to commit second-degree murder. If the defendant had agreed with his coconspirators to murder, the completed conspiracy crime would have been conspiracy to commit murder in the first degree because of the planning and premeditation involved. On the other hand, if defendant had agreed with his coconspirators to assault his victim, and the conspirators did not intend for the victim to die, even though death did in fact result, the conspiracy crime would have involved some sort of assault offense which would have been completed before the victim's death occurred.[5]

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[5] Where the particular facts of a case make it unclear as to the intent of the conspirators, we think a prosecutor would be justified in filing and bringing a defendant to trial under a multi-count information. See People v Jankowski, 408 Mich 79, 92-93; 289 NW2d 674 (1980). Thus, a conspirator might be charged with one count of conspiracy to commit some type of assaultive offense. It would then be for the jury to determine which, if any, offense had been committed.

For the foregoing reasons, defendant's conviction of conspiracy to commit second-degree murder is vacated. Defendant's conviction of second-degree murder is affirmed as is his sentence.

Affirmed in part; reversed in part.

Bronson, J., concurred.

J.H. Gillis, J. (concurring in part; dissenting in part.) I agree with parts I through IV of the majority opinion. However, as to part V I must dissent. The majority holds that defendant cannot be convicted of conspiracy to commit second-degree murder because conviction of such

crime would be in itself logically inconsistent.

Defendant was not charged with conspiracy to commit second-degree murder. He was charged with conspiracy to commit first-degree murder. The second-degree murder conspiracy instruction was given apparently in order to comply with People v Jenkins, 395 Mich 440; 236 NW2d 503 (1975). In Jenkins, the Michigan Supreme Court held that in every case in which first-degree murder is charged, the trial court must instruct the jury sua sponte, and even over objection, on second-degree murder.

In the case at bar no objection to the instruction was proffered by defendant. A verdict of guilty of conspiracy to commit second-degree murder was returned by the

jury.

Juries are not held to any rules of logic. The Michigan Supreme Court has held that juries are free to render verdicts which are inconsistent. People v Vaughn, 409 Mich 463; 295 NW2d 354 (1980). This rule preserves the jury's power to dispense mercy. Id., 466. In light of this rule, coupled with defendant's failure to object to the instruction, I would affirm the conviction.

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 69615

ROBERT BERNARD JACKSON,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

M.F. CAVANAGH, J.

The common issue presented in these appeals is whether statements obtained after a defendant has requested appointment of counsel at arraignment are admissible pursuant to the principles enunciated in Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), and People v Paintman, 412 Mich 518; 315 NW2d 418 (1982), cert den 456 US 995; 102 S Ct 2280; 73 L Ed 2d 1292 (1982).

I

A

Defendant Bladel was convicted by a jury in July, 1979, of three counts of first-degree premeditated murder.[1] He was sentenced to three concurrent mandatory life sentences. Testimony at trial revealed that three railroad employees were shot to death on December 31, 1978, at the Amtrak station in Jackson, Michigan. Defendant, a disgruntled former railroad employee, was the prime suspect.[2] He was arrested on January 1, 1979, and questioned twice by Detective Gerald Rand on January 1 and 2. Defendant was properly advised of his Miranda[3] rights before each questioning and agreed both times to talk without an attorney. Defendant admitted being in and around the station on December 30 and 31, 1978, but denied any involvement in the kill-

ings. He was released on January 3.

On March 18, 1979, the shotgun used in the killings was found. The weapon had been purchased by defendant two years before the killings. The police also obtained strong scientific evidence linking him to the killings. Defendant was arrested in Elkhart, Indiana, on March 22, 1979. He waived extradition after being advised by a magistrate of his right to a full hearing and representation by counsel.

Defendant was driven back to Jackson the same afternoon. Detective Rand questioned him again that evening. Prior to questioning, defendant was properly advised of his rights, agreed to talk without counsel, and signed a waiver form. He did not confess to the killings.

Defendant was arraigned on Friday, March 23, 1979, in the presence of Detective Rand. Defendant requested that counsel be appointed for him because he was indigent. A notice of appointment was mailed to a law firm that day, but was not received until Tuesday, March 27, 1979. Defendant was not informed during the interim that counsel had been appointed, although he inquired several times.

On March 26, 1979, two police officers interviewed defendant in the county jail. Although the officers were working with Detective Rand on this case, they were not told that defendant had requested counsel. Prior to questioning, the defendant was again properly advised of his Miranda rights. When he informed the officers that he had requested counsel, they inquired whether he wished to have

an attorney present during questioning. Defendant agreed to proceed without counsel, signed a waiver form, and subsequently confessed to the killings.

Defendant challenged the admissibility of the confession and the three exculpatory statements at a pretrial Walker[4] hearing. The trial court ruled that all of the statements were admissible because defendant was properly advised of his rights and had knowingly and understandingly waived them each time.[5]

On appeal, defendant challenged only the admissibility of the confession. The Court of Appeals upheld the trial court's decision and affirmed the convictions.[6] People v Bladel, 106 Mich App 397; 308 NW2d 230 (1981). In lieu of granting leave to appeal, this Court remanded to

the Court of Appeals for reconsideration in light of People v Paintman and People v Conklin, 412 Mich 518; 315 NW2d 418 (1982). On remand, the Court of Appeals summarily concluded that Paintman and Conklin, when read in conjunction with this Court's remand order, "compelled" reversal. 118 Mich App 498; 325 NW2d 421 (1982). We granted the prosecutor's application for leave to appeal. 417 Mich 885; 330 NW2d 846 (1983).

B

Defendant Jackson was charged with first-degree murder, conspiracy to commit first-degree murder, [7] and possession of a firearm during the commission of a felony[8] in connection with the death of Rothbe Elwood Perry. He was convicted by a jury in February, 1980, of second-degree murder[9] and conspiracy to commit second-degree murder. He was sentenced

to two concurrent life terms.

Mr. Perry was shot and killed in his home in Livonia, Michigan, on July 12, 1979, during an apparent robbery. On July 28, 1979, Mildred Perry (the deceased's wife) and Charles (Chare) Knight were arrestred for the murder. Knight subsequently told Livonia police that Mildred Perry had solicited him to kill her husband. He, in turn, had contacted defendant. Knight maintained that defendant and another man had broken into the house and shot the deceased.

Defendant and Michael White were arrested on Monday, July 30, 1979, by Detroit police on an unrelated charge. They were turned over to the Livonia police at approximately 2 p.m. the following day. Defendant was questioned several times on

July 31 and gave three similar statements.10 Defendant admitted breaking into the house to kill Mr. Perry, but maintained that Knight had fired the shots.

On August 1, at approximately 10 a.m., defendant submitted to a polygraph examination after being advised of his Miranda rights. When defendant was informed that he had not passed, he told the examiner that he was the shooter and White had accompanied him. Defendant gave substantially similar oral and written statements shortly thereafter to Sergeant William Hoff, one of the officers in charge of the case.11

Defendant, White, Perry, and Knight were arraigned at 4:30 p.m. that afternoon. During arraignment, defendant re-

quested that counsel be appointed for him. Sergeants Hoff and Shirley Garrison were present when defendant requested counsel.

At 10:24 a.m. the next morning, defendant was readvised of his rights by Sergeants Garrison and Hoff and agreed to give another tape-recorded statement to "confirm" that he was the shooter. Defendant had not yet had an opportunity to consult with counsel. When asked whether he had been promised anything for his statement, defendant replied that nothing had been actually guaranteed, but something would be worked out.

Prior to trial, a lengthy Walker hearing was conducted. The trial court ruled that all of defendant's statments were admissible because he had been advised of

his Miranda rights before each statement was given, he never requested an attorney during the interrogations, he knowingly and voluntarily waived his rights each time, no improper promises or threats were made by the police, and the statements were not the result of any illegal delay in arraignment.12

In affirming defendant's conviction for second-degree murder,13 the Court of Appeals upheld the trial court's findings of fact. As to the post-arraignment statement, the court noted that the original panel in Bladel had found a knowledgeable and voluntary waiver of the right to counsel on almost identical facts. Edwards and Paintman were distinguished on the grounds that defendant asked for an attorney at arraignment, rather than during the police interroga-

tion. This request was "not made in such a way as to effectively exercise the right to preclude any subsequent interrogation" and was unrelated to defendant's Fifth Amendment right to counsel. 114 Mich App 649, 658-659; 319 NW2d 613 (1982). We granted defendant's application for leave to appeal. 417 Mich 885; 330 NW2d 846 (1983).

II

Defendants argue that their post-arraignment statements were obtained in violation of their Fifth and Sixth Amendment rights to counsel because they asked the arraigning magistrate for appointed counsesl. To determine whether these statements are admissible, the following questions must first be resolved:

1) What constitutional right(s) to counsel attached at the post-arraignment interrogations?

2) What right(s) to counsel did defendants invoke when they requested counsel at arraignment?

3) What right(s) to counsel did defendants purportedly waive prior to their post-arraignment interrogations?

A

The right to counsel is guaranteed by both the Fifth and Sixth Amendments to the United States Constitution, as well as Const 1963, art 1 § 17 and 20.14 However, these constitutional rights are distinct and not necessarily coextensive. See Rhode Island v Innis, 446 US 291, 300, fn 4; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

In Miranda, the United States Supreme Court declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial

interrogation in order to protect the accused Fith Amendment privilege against compulsory self-incrimination. Innis, supra, p 297; Edwards supra, 451 US 481. However, the Fifth Amendment right to counsel attaches only when an accused is in custody, United States v Henry, 447 US 264, 273 fn 11; 100 S Ct 2183; 64 L Ed 2d 115 (1980), and subjected to interrogation. Innis, supra, p 298; Kirby v Illinois, 406 US 682, 688; 92 S Ct 1877; 32 L Ed 2d 411 (1972). Once an accused invokes his right to have counsel present during custodial interrogation, the police must refrain from further interrogation until counsel is made available, unless the accused initiates further communications, exchanges, or conversations with the police. Edwards, supra, pp 484--485; Paintman, supra, 412 Mich 526. Neither Miranda nor its progeny limits

the Fifth Amendment right to counsel to custodial interrogations conducted prior to arraignment. Since defendants were clearly subjected to custodial interrogation when they made their post-arraignment confessions, their Fifth Amendment right to counsel had attached.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right....to have the Assistance of Counsel for his defense." However, this right to counsel attaches only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment. United States v Gouveia, ___ US ___, ___; 104 S Ct 2292; 81 L Ed 2d 146, 153-154 (1984); Kirby, supra, 406 US 688-689. The accused is

entitled to counsel not only at trial, but at all "critical stages" of the prosecution, i.e., those stages "where counsel's absence might derogate from the accused's right to a fair trial." United States v Wade, 388 US 218, 226-227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). Regardless of whether the accused is in custody or subjected to formal interrogation, the Sixth Amendment right to counsel exists whenever the police attempt to elicit incriminating statements. Henry, supra, 447 US 271-273. See also Brewer v Williams, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977); Messiah v United States, 377 US 201; 84 S Ct 1199; 12 L Ed 2d 246 (1964). This right to counsel does not depend upon a request by the accused and courts indulge in every reasonable presumption against waiver. Brewer, supra, pp 404-405. Since defendants were interrogated

subsequent to arraignment, they were also entitled to counsel under the Sixth Amendment.

B

The foregoing analysis demonstrates that defendants' request to the arraigning magistrate for appointment of counsel implicated only their Sixth Amendment right to counsel. Although defendants were in custody at the time of their arraignments, they were not subjected to interrogation. In addition, they did not specifically request counsel for any subsequent custodial interrogations which might be conducted. Defendants requested appointed counsel because they were financially incapable of retaining an attorney and were unwilling to represent themselves. See State v Sparklin, 296 Or 85; 672 P2d 1182, 1185-1186 (1983).

C

The trial courts found that defendants never invoked their Fifth Amendment right to counsel before or during their post-arraignment interrogations. Furthermore, defendants knowingly and voluntarily waived their Miranda rights prior to their statements. Our independent review of the record does not disclose that these findings are clearly erroneous. People v McGillen #1, 392 Mich 251, 257; 220 NW2d 677 (1974); People v Robinson, 386 Mich 551, 557; 194 NW2d 709 (1972).

III

The question remains whether defendants' waiver of their Fifth Amendment right to counsel also waived their Sixth Amendment right to counsel. Defendants were given standard Miranda warnings prior to their post-arraignment interrogations. However, these warnings were

designed to advise an accused only of his Fifth Amendment rights. The Sixth Amendment right to counsel is considerably broader than its Fifth Amendment counterpart since it applies to all critical stages of the prosecution. Neither the United States Supreme Court nor this Court has delineated specific procedural requirements for waiver of the Sixth Amendment right to counsel.[15]

A

Courts which have specifically addressed the problem of requests for counsel at arraignment have reached differing results both before and after Edwards was decided. The Second Circuit Court of Appeals has adopted the strictest procedural requirements for waiver of the Sixth Amendment right to counsel. In United States v Satterfield, 558 F2d 655, 657 (CA 2, 1976), defendant's post-indictment

and post-arraignment statements were suppressed, even though he had executed a written waiver of his Miranda rights. The Court reasoned that even if the statements were voluntary for purposes of the Fifth Amendment "they were involuntary with 'regard....[to] the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment was attached.'"

Specific procedural safeguards were adopted in United States v Mohabir, 624 F2d 1140 (CA 2, 1980).[16] The Mohabir Court explained that a higher standard for waiver of counsel is required after judicial proceedings have commenced because the government has committed itself to prosecute, and any questioning by the government can only be for the purpose of buttressing its prima facie case. Informing a defendant of his Miranda rights and the fact that he has been indicted is insufficient, since this information may not allow the accused to "'appreciate the gravity of his legal position, and, the urgency of his need for a lawyer's assistance.'" Id., pp 1148-1150. In the exercise of its supervisory power, the Mohabir Court held that an accused may not validly waive his Sixth Amendment right to counsel unless a federal judicial officer has explained the content and significance of this right.[17] Furthermore, the accused must be shown the indictment and informed of its significance, the right to counsel, and the seriousness of his situation should he decide to answer further police questions without counsel. The Court believed that this procedure would minimize disputes as to what warnings were actually given and

whether defendant fully comprehended his rights. Id., p 1153.

The Fifth Circuit, on the other hand, has reached conflicting results, primarily because it has not adequately distinguished the Fifth and Sixth Amendment rights to counsel. In Blasingame v Estelle, 604 F2d 893, 895-896 (CA 5, 1979), the Court stated that the crucial inquiry is whether defendant's assertion of his right to counsel before the arraigning magistrate was made in such a manner that the subsequent police questioning "impinged on the exercise or the suspect's continuing option to cut off the interview." It was noted that some defendants may wish to have an attorney represent them in legal proceedings, yet wish to assist the police by responding to questions without an attorney being

present. The Court found that Blasingame's request was not an invocation of his Fifth Amendment right to confer with or have counsel present during questioning. Since he was informed of his Miranda rights at arraignment and before his subsequent interrogation, and had voluntarily and intelligently waived these rights, his post-arraignment statements were admissible.[18] Blasingame, however, was decided solely on Fifth Amendment grounds.

A contrary result was reached in Silva v Estelle, 672 F2d 457 (CA 5, 1982). There, defendant was questioned one hour after he asked the arraigning magistrate for permission to call his attorney. This request was construed as an unequivocal exercise of defendant's right to counsel. The Silva Court concluded that under

Edwards, the police were not entitled to initiate further interrogation unless they first honored defendant's request for counsel. Like Blasingame, Silva did not distinguish between defendant's Fifth and Sixth Amendment rights to counsel.

Shortly after Silva was decided, Jordan v Watkins, 681 F2d 1067, 1073-1075 (CA 5, 1982), held that the police, who were not aware that counsel had been appointed at arraignment, properly interrogated the defendant. Edwards was distinguished on the grounds that Jordan had never requested counsel with respect to custodial interrogation or attempted to cut off questioning; he merely wanted counsel to assist him in further judicial proceedings. (The Jordan Court relied heavily upon Blasingame in reaching this conclusion, but did not mention Silva.)

After examining the totality of the circumstances, the Court found that Jordan had voluntarily, knowingly, and intelligently waived both his Fifth and Sixth Amendment rights to counsel.

In contrast, the Sixth Circuit held, in United States v Campbell, 721 F2d 578, 579 (CA 6, 1983), that incriminating statements obtained thirteen minutes after defendant requested and was appointed counsel were inadmissible. The Court noted that the interrogating agents had manifested an indifference to, if not an intentional disregard for, defendant's Sixth Amendment right to counsel and Fifth Amendment right against compulsory self-incrimination, primarily because they were present when defendant requested counsel. The agents improperly conducted "one last round of interrogation"

before defendant had an opportunity to consult with counsel. Such conduct clearly violated Edwards. Jordan was distinguished because Campbell had not voluntarily, knowingly, and intelligently waived his Fifth Amendment right to counsel by initiating the post-arraignment conversation.

Several state supreme courts have addressed this problem, but have also reached conflicting results. In Johnson v Commonwealth, 220 Va 146, 158-159; 255 SE2d 525 (1979), later app 221 Va 736; 273 SE2d 784 (1981), cert den 454 US 920; 102 S Ct 422; 70 L Ed 2d 231 91981), the police initiated interrogation five hours after defendant requested counsel at arraignment. The Virginia Supreme Court held that defendant's confession was admissible because he had knowingly, intel-

ligently, and voluntarily waived his right to counsel prior to interrogation. The Court found that the police officers' conduct was not coercive, they were not aware that defendant had been arraigned, and defendant had never requested counsel during the interrogation. However, the Johnson Court did not distinguish between defendant's Fifth and Sixth Amendment rights to counsel. Furthermore, the case was decided prior to Edwards.

The United States Supreme Court ultimately denied defendant's petition for certiorari, over a lengthy dissent written by Justice Marshall. He believed that the decision to admit the confession was contrary to the spirit, if not the letter, of Edwards. He rejected the state's attempt to distinguish Edwards:

"The State attempts to distinguish Edwards on two grounds. First, it points out that Edwards clearly expressed his desire to deal with police only through counsel, whereas petitioner here simply asked that an attorney be appointed. However, an accused is under no obligation to state precisely why he wants a lawyer. If we were to distinguish cases based on the wording of an accused's request, the value of the right to counsel would be substantially diminishd. As we stated in Fare v Michael C., 442 US 707, 719 [99 S Ct 2560; 61 L Ed 2d 197] (1979), 'an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.'

"Second, the State notes that Edwards informed the police of his desire for an attorney, whereas petitioner only informed the judge at his arraignment. The State suggests that since the police did not know about petitioner's request, the interrogation was not improper. However, the police could easily have determined whether petitioner had already exercised his right to counsel; presumably, a prosecutor was present at the arraignment. They did not know about petitioner's request for a lawyer only because they made no effort to determine whether such a request had been made. But even if the police could not have discovered that petitioner had expressed a desire for an attorney, I would hold that

the confession should not have been admitted. The key question in this case is whether petitioner's waiver of his right to counsel was knowing, intelligent, and voluntary. In determining whether these conditions were satisfied, the fact that the police were unaware of a prior request for counsel is only tangentialy relevant. What is important, rather, is the state of mind of the accused. I think it is no more safe to assume that a waiver is valid when an accused has made a prior request to the judge at his arraignment than when he has made the request to police. In both cases, the accused informs an individual in authority that he would like an attorney--and yet shortly thereafter, state officials, apparently

disregarding his request, ask him to waive his rights." 454 US 922-923.

In State v Sparklin, 296 Or 85; 672 P2d 1182 (1983), the Oregon Supreme Court carefully differentiated between the two constitutional rights to counsel. There, defendant requested an attorney at his arraignment on a forgery charge stemming from the use of a stolen credit card. That evening, the police interrogated him concerning an assault on the credit card owner and a factually unrelated murder and robbery. Defendant waived his Miranda rights and confessed to the murder.

The Sparklin Court initially found that defendant had not invoked either his state or Fifth Amendment right to counsel or privilege against compulsory self-

incrimination during arraignment. Unlike an interrogation session, a defendant is not confronted with an atmosphere of coercion or attempts to gain admissions during arraignments. Without a more explicit request or one made in anticipation of, or during, interrogation, defendant's request for an attorney was deemed to be merely "a matter of routine." Id., pp 1185-1186.

Turning to the Sixth Amendment right to counsel and its state counterpart, the Sparklin Court noted that pursuant to its earlier interpretations of the Oregon Constitution, the state was required to notify the defendant's attorney prior to interrogation and afford him an opportunity to be present. Furthermore, the defendant could not waive his state constitutional right to counsel until he had

consulted with his attorney, although he could volunteer statements on his own initiative. Id., p 1187. Although the comparable Sixth Amendment right to counsel was not so clearly defined, the court believed that it was of equal scope. Id., p 1188. In dicta, the Court noted that if defendant had been questioned for the crimes against the credit card owner, the interrogation would have been improper since no waiver could have been given before counsel was consulted. Id., p 1190.19

The most recent decision is State v Wyer, 320 SE2d 92 (W Va, 1984). After reviewing numerous cases, the West Virginia Supreme Court concluded that there is no rule per se against waiver of the Sixth Amendment right to counsel. However, it believed that such a waiver should be

judged by stricter standards than a waiver of the Fifth Amendment right to counsel. The Wyer Court refused to equate a general request for counsel at arraignment with an Edwards direct request for counsel to an interrogating officer, since the Sixth Amendment right attaches regardless of whether a specific request is made. Thus, the police could initiate questioning after a defendant requests counsel at arraignment, as long as the defendant is willing to waive his Sixth Amendment right.

In order to ensure a valid waiver of the Sixth Amendment right to counsel, the Wyer Court held that a defendant must execute a written waiver after being informed of his arrest, the nature of the charges against him, and his Miranda rights. If the defendant asserts his

Edwards right to counsel when the waiver is sought, interrogation must cease until counsel is made availale, unless the defendant initiates further communications with the intent to waive his Sixth Amendment right to counsel. The interrogating officer's knowledge that counsel has been requested was deemed to be only "one ingredient" in determining whether the waiver was valid, rather than an absolute bar. Id., p 105 and fns 23 & 25.

The Wyer dissent persuasively argued that if a Miranda waiver is inadequate to protect the Fifth Amendment right to counsel under Edwards, it certainly would be inadequate to protect the greater Sixth Amendment right. The dissent believed that once a defendant makes an oral or written request for counsel to the magistrate, the police must notify his

lawyer and refrain from further interrogation until the defendant has spoken to him. If, after consultation, the defendant wishes to forego his right to counsel, he can then do so. The officer's presence at arraignment was deemed an irrelevant consideration, since both he and the prosecutor have a duty to discover whether the defendant has been arraigned and if he requested counsel. Such safeguards would not prevent confessions, but only guarantee that they were voluntary and obtained without violating the defendant's right to counsel. The dissent concluded:

> "[I]t is time to recognize that all defendants without counsel are constitutionally disadvantaged when faced with a government armory of

> armed police, prosecutors and professional interrogators." Id., p 111.

B

As the foregoing discussion demonstrates, no consistent approach to the waiver problem has emerged. However, it is clear that no court has adopted a per se rule which prevents a defendant from ever waiving his Sixth Amendment right to counsel.20 We also decline to adopt such a rule.

It is also clear that if defendants had invoked their Fifth Amendment right to counsel to the police, Edwards and Paintman would have barred all further interrogation until defendants had an opportunity to consult with counsel, since they did not reinitiate further

conversations with the police. The United States Supreme Court adopted this prophylactic rule to protect an accused from being badgered by the police while in custody. Oregon v Bradshaw, 462 US 1039, ; 103 S Ct 2830; 77 L Ed 2d 405, 411 (1983).

Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who

asks a police officer for an attorney, but permit further interrogation of a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indictes that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly. As Justice Marshall noted, if we are to distinguish cases solely on the wording of an accused's request and to whom it is made, the value of the right to counsel would be substantially diminished.

Furthermore, once adversary judicial proceedings have commenced, the police have "everything to gain" and the accused "everything to lose" when "one last round" of interrogation is conducted before counsel arrives:

"As Justice Stewart noted in Kirby v Illinois, supra, 406 US at 689-690:

> "'The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is

> this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.' * * * *

"The indictment thus marks a crucial point for the defendant; it also marks the point after which any questioning of the defendant by the government can only be 'for the purpose of buttressing. . .a prima facie case. . .[S]ince the finding of the indictment presumably imports that the People have legally sufficient evidence of the defendant's guilt of the crime charged. . ., the necessities of appropriate police investigation "to solve a crime, or even to absolve a sus-

pect" cannot be urged as justification for any subsequent questioning of the defendant.'

* * *

"[A]s Judge Knapp pointed out in United States v Satterfield, 417 F Supp 293, 296 (SDNY), aff'd, 558 F2d 655 (CA 2, 1976):

"'Prior to indictment--before the prosecution has taken shape --there may be reasons why a suspect might rationally wish to deal with agents without the intervention of counsel. By getting in their good graces and being useful to the government he might be able altogether to avoid indictment or any legal entanglement. No such opportunity is open to him af-

ter a grand jury has spoken. At that point he cannot make any arrangement with agents or prosecutor that is not subject to ultimate approval by the court, and counsel is obviously important to advise him on what terms such approval is likely to be forthcoming and how best to obtain it.'" Mohabir, supra, 624 F2d 1148-1149.21

Finally, it is clear that every court has acknowledged that the Sixth Amendment right to counsel is as important, if not more so, than the judicially created Fifth Amendment right to counsel. As such, it is entitled to be protected by procedural safeguards at least as stringent as those designed for its lesser counterpart. We decline to follow the

reasoning of those cases which have found valid Sixth Amendment waivers after a request for counsel has been made to a magistrate based solely on waivers of Miranda rights. The majority of these cases did not sufficiently distinguish between the concerns underlying the Fifth and Sixth Amendment rights to counsel. As the Wyer dissent noted, if a Miranda waiver is insufficient to ensure a valid waiver of the Fifth Amendment right to counsel pursuant to Edwards, it certainly should be inadequate to ensure a valid waiver of the greater Sixth Amendment right.

C

We need not decide at this time whether stricter procedural standards for waiver of the Sixth Amendment right to counsel are required. We need only hold that, at a minimum, the Edwards/Paintman

rule applies by analogy to those situations where an accused requests counsel before the arraigning magistrate.[22] Once this request occurs, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police.[23] If a defendant chooses to reinitiate communications, he must be sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right. See Bradshaw, supra, ___ US ___; 77 L Ed 2d 413; Johnson v Zerbst, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938).

We further hold that before commencing interrogation, the police have an obligation to determine whether an accused

has been arraigned and requested counsel. This duty is no more onerous than that imposed by Edwards and Paintman. As Justice Willams observed in his dissent in People v Esters, 417 Mich 34, 64; 331 NW2d 211 (1982):

> "[T]he defendant's rights may not be diminished merely because the state fails to respond to defendant's request for counsel, as it should have done. Once he has asked for counsel, the defendant has done all that is within his power to secure this guaranteed right."

We also note that the police officers who were in charge of the investigations in both Bladel and Jackson were present at the arraignments when defendants requested appointed counsel. Although the

officers who later interrogated Bladel were not present at arraignment, Bladel informed them of his request prior to questioning. In both cases, the police were attempting to strengthen their cases by conducting "one last round" of interrogation before counsel arrived. Interrogations of defendants who are represented by counsel without counsel's knowledge have been repeatedly criticized. See, e.g., United States v Campbell, 721 F2d 578, 579 (CA 6, 1983); United States v Cobbs, 481 F2d 196, 200 (CA 3, 1973), cert den 414 US 980; 94 S Ct 298; 38 L Ed 2d 224 (1973); United States v Springer, 460 F2d 1344, 1353 (CA 7, 1972), cert den 409 US 873; 93 S Ct 205; 34 L Ed 2d 125 (1972); Paintman, supra, 412 Mich 529-530.

The Police cannot simply ignore a

defendant's unequivocal request for counsel. As this Court noted in Paintman, supra:

> "Of what significance is invocation of a cherished constitutional right if it is ignored by the hearer and, in fact, only seems to exacerbate the defendant's plight? As the time gap increases between the embracing of the right and its fulfillment, the certainty of its existence must surely dim."

In fact, defendant Bladel specifically testified that he began to doubt whether he would have counsel appointed because he did not meet with an attorney until three days after his arraignment. Furthermore, when he asked the jail personnel and the interrogating officers

whether counsel had been appointed for him, they repetedly pleaded ignorance.

Since def dants Bladel and Jackson requested counsel during their arraignments, but were not afforded an opportunity to consult with counsel before the police initiated further interrogations, their post-arraignment confessions were improperly obtained and must be suppressed. Plaintiffs nevertheless maintain that defendants' statements need not be suppressed because they were tried before Edwards was decided. In Solem v Stumes, US ___, ___; 104 S Ct 1338; 79 L Ed 2d 579, 592 (1984), the Supreme Court refused to apply Edwards retroactively to collateral reviews of final convictions. The Court, however, specifically declined to decide whether Edwards could be applied retroactively to defendants whose

convictions were not yet final when the decision was issued.

We need not decide this question since a violation of the Fifth Amendment right to counsel is not involved in either of these cases. We have merely extended the Edwards/Paintman rule by analogy to cases involving requests for counsel during arraignment, on the basis of our interpretation of both the Sixth Amendment right to counsel and its state constitutional counterpart embodied in Const 1963, art a § 20. Given the Supreme Court's holding that Edwards established a new "bright line" test,[24] the fact that this Court has not previously articulated precise procedural standards for waivers of the Sixth Amendment right to counsel, and the diverse approaches adopted in other jurisdictions, the rules

articulated herein will apply to the instant cases, those cases tried after this opinion is issued, and those cases pending on appeal which have raised the issue.

IV

Defendant Jackson further argues that his six pre-arraignment confessions were inadmissible because the police deliberately delayed arraignment in order to obtain them or the confessions were induced by police threats and promises. The trial court rejected both arguments. The Court of Appeals agreed that the pre-arraignment delay was not used to extract a confession. Defendant was properly advised of his Miranda rights before each session and, according to the police officers, he volunteered his statements. 114 Mich App 654-655.[25]

A

Although the police had sufficient probable cause to obtain a warrant for defendant Jackson's arrest as a result of codefendant Knight's statements, they did not do so. Defendant was "arrested" on the murder charges on Tuesday, July 31, at 2 p.m. when he was turned over to the Livonia police. Since defendant was arrested for a felony without a warrant, the arresting officers were required to bring him before a magistrate for arraignment without unnecessary delay. MCL 764.13; MSA 28.871(1); MCL 764.26; MSA 28.885; People v Mallory, ___ Mich ___; ___ NW2d ___ (1984) (slip op, p 5); People v White, 392 Mich 404, 424; 221 NW2d 357 (1974), cert den sub nom Michigan v White, 420 US 912; 95 S Ct 835; 42 L Ed 2d 843 (1975). Immediate arraignment is not required, however.

Circumstances may require a brief delay for "booking," a quick verification of the accused's volunteered "story," or a brief questioning to determine the immediate question of release or complaint. Mallory v United States, 354 US 449, 454-455; 77 S Ct 1356; 1 L Ed 2d 1479 (1957); People v Hamilton, 359 Mich 410, 416-417; 102 NW2d 738 (1960). Even when an unnecessary delay has occurred, admissions or confessions obtained during this period will not be excluded unless the delay was enemployed as a tool to extract the statement. Mallory, supra, ___ Mich (slip op, p 5); White, supra.

Defendant was not arraigned until August 1 at 4:30 p.m., approximately 26 1/2 hours after his arrest. He was first interrogated shortly after arriving at the Livonia police station. The police ini-

tially obtained background information from defendant and informed him of his rights, the nature of the charges against him, and the mandatory punishment of life imprisonment for first-degree murder. They then confronted him with Knight's statement that defendant and another person had committed the murder. At approximately 3:30 p.m., defendant admitted that he was present during the murder, but maintained that Knight was with him and had shot the victim.

We conclude that this first oral statement was not obtained during a period of unreasonable delay. The officers' questioning occurred 1 1/2 hours after the arrest and was for the purpose of determining whether Knight had unjustly accused defendant.

Sergeant Richard Ericson, another officer in charge of the case, testified at the Walker hearing that after this first confession, the police had sufficient information to obtain an arrest warrant against defendant. Sergeant Hoff testified similarly, but explained that they could not have obtained a warrant because the prosecutor's office was closed and there was no one available to authorize the warrant request. Shortly after the first statement was given, the police asked defendant to repeat his statement so that it could be tape-recorded. Defendant agreed. The recording began at 5:52 p.m. However, the quality of the recording was so poor that the police asked defendant to repeat the statement again. The second taping began at 8:48 p.m. The content of these two recorded statements

did not substantially differ from that of the prior oral statement.

Giving the police the benefit of the doubt, we conclude that no unreasonable delay occurred between the arrest and the time these two taped statements were given. If any unreasonable delay occurred, it was not used to extract a new statement, but merely to memorialize the first oral statement.[26]

After the second taped statement, defendant was confronted by the fact that his version still differed from Knight's, i.e., defendant claimed that he and Knight were present but that Knight was the shooter, while Knight claimed that defendant and White committed the murder. The police noted that Knight had agreed to undergo a polygraph examination the

following morning and requested that defendant undergo one also. Defendant agreed.

The examination began at approximately 10 a.m. The polygraph examiner informed defendant of his rights and that he did not have to submit to the exam. Defendant still agreed to the polygraph. Afterwards, the examiner informed defendant that he had not been truthful and urged him to tell the other officers the truth in order to maintain his credibility. Defendant then confessed to the examiner that he had shot the victim and that White, not Knight, had been present. The examiner immediately informed Sergeant Hoff, who was waiting outside the polygraph room. Shortly thereafter, Sergeant Hoff met with defendant, advised him of his rights, and obtained substantially

similar oral and written statements.

Primarily on the basis of the officers' testimony at the Walker hearing, we conclude that the three post-polygraph statements were obtained during an unnecessary pre-arraignment delay and that the delay was employed as a tool to extract these statements. Sergeant Hoff testified that if an arrest warrant had been issued during the morning of August 1, defendant could have been arraigned at the time, except for the polygraph exam. Sergeant Ericson testified that he began preparing the 36-page warrant request for all four defendants at 9:30 a.m. on August 1, and finished at 1 p.m. On cross-examination, however, he stated that he had previously prepared a request and obtained a warrant for codefendant Perry. The warrant requests for Perry and defendant were

substantialy similar, except for the information concerning Knight's statements, and defendant's pre- and post-polygraph confessions. Sergeant Ericson thereafter presented the request to the prosecutor's office, obtained the complaints and warrants, and arrived at the Livonia District Court at approximately 4:30 p.m. for the arraignment.

Although the thoroughness with which the warrant request was prepared may be commendable, the police cannot justify infringing upon a defendant's statutory and constitutional rights to a prompt arraignment merely on the grounds that their "paperwork" has not yet been completed. A contrary conclusion would encourage dilatory efforts in seeking and obtaining the prosecutor's authorization. It must be remembered that a magistrate

is required to issue an arrest warrant upon presentation of a proper complaint alleging the commission of an offense and upon a finding of reasonable cause to believe that the accused committed the offense. MCL 764 1a; MSA 28.860(1). The complaint need not contain every fact which contributed to the affiant's conclusions, nor must every factual allegation be independently documented. The complaint simply has to be sufficient enough to enable the magistrate to determine that the charges are not capricious and are sufficiently supported to justify further criminal action. Jaben v United States, 381 US 214, 224-225; 85 S Ct 1365; 14 L Ed 2d 345 (1965); United States v Fachini, 466 F2d 53, 56 (CA 6, 1972). In addition, a complaint may thereafter be amended if additional evidence so requires. The police and the

prosecutor here had sufficient evidence to draft a complaint and obtain a warrant before or shortly after defendant was arrested. There was no need, for purposes of arraignment, to determine whether Knight or defendant was telling the truth.

The delay was used as a tool to extract the three post-polygraph statements. Sergeants Ericson, Hoff, and Garrison all testified that they asked defendant to submit to a polygraph so that they could determine whether he was telling the truth. Although they did not specifically instruct the examiner to obtain a statement, Sergeant Hoff testified that they had hoped to obtain another statement if defendant's original confession proved inaccurate. The police were obviously attempting to strengthen their

case against all four defendant's, particularly White, who had not yet confessed to any involvement. The three post-polygraph confessions therefore were not admissible.[27]

B

After reviewing the record, we conclude that the trial court did not clearly err in finding that defendant's three pre-polygraph confessions were not improperly induced by threats or promises.[28] In light of our prior conclusion that the post-polygraph confessions are inadmissible, we need not determine whether they were the product of threats or promises. Although defendant's three pre-polygraph confessions implicated him in the murder at least as an aider and abettor, a new trial is required. Defendant testified before the jury that he did not make the first oral statement and

that the two taped confessions were induced by police threats and promises. The cumulative effect of admitting seven confessions, as opposed to three, may have made a difference in the jury's determination of credibility.

V

The decision of the Court of Appeals is affirmed in Bladel and reversed in Jackson. These cases are remanded to the trial court for further proceedings consistent with this opinion.

/s/ Michael F. Cavanagh

/s/ G. Mennen Williams

/s/ Charles Levin

/s/ Thomas G. Kavanagh

1

MCL 750.316; MSA 28.548.

2

The evidence against defendant was substantial. Shortly before he died, one of the victims indicated that the assailant was a white male. A ticket clerk observed a tall, husky person walking away from the station after the shootings, carrying a soft-sided suitcase. A passerby similarly testified that he observed a stocky man wearing a jacket and cap walking away from the station carrying a case. He entered a nearby hotel. Defendant had rented a room at that hotel on December 30 and 31, 1978.

When defendant was arrested on January 1, 1979, he was wearing a blue nylon jacket and cap and was carrying a brown soft-sided suitcase, which contained a

can of gun oil. Defendant first claimed that he had been nowhere near the station, but later stated that he had used the restrooms there twice. He claimed to have recently arrived in Jackson to look for a job, even though it was a holiday weekend.

A 12-guage shotgun and duck jacket were found in mid-March 1979. Ballistics evidence disclosed that a spent shotgun shell found at the scene of the killings came from the shotgun. The weapon had been purchased by defendant in Elkhart, Indiana, two years before the killings. Fibers found on the gun and the duck jacket and in defendant's suitcase were identical. A speck of human blood was also found on the cap defendant was wearing when he was first arrested.

3

Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

4

People v Walker (On Rehearing), 374 Mich 331; 132 NW2d 87 (1964).

5

The court acknowledged that the lack of opportunity to consult with counsel before interrogation does affect the voluntariness and effectiveness of a waiver. However, it knew of no case which required suppression under these circumstances.

6

The Court of Appeals rejected defendant's assertion that interrogation can never occur once a defendant requests counsel. The court acknowledged that the prosecutor bore a heavy burden in proving a knowledgeable and voluntary waiver and

that the police may have acted unethically in obtaining the confession. Nevertheless, the waiver was valid because defendant had been warned by the Indiana magistrate not to talk to police until he met with counsel, he had prior contact with the criminal justice system and understood his rights, he had signed a waiver form, and had not reasserted his right to counsel during the interrogation. Finally, the four-day delay between arraignment and the first meeting with counsel was not unreasonable. There was no evidence that defendant was kept from his attorney in order to obtain a confession.

7

MCL 750.157a; MSA 28.354(1) and MCL 750.316; MSA 28.548.

8

MCL 750.227b; MSA 28.424(2).

9

MCL 750.317; MSA 28.549.

10

Defendant's first oral statement was given at 3:30 p.m. A similar statement was tape recorded at 5:52 p.m., but was retaped at 8:48 p.m. because of the poor quality of the prior recording. Defendant maintained that he was not advised of his Miranda rights until shortly before the first taping and that he had requested an attorney during the first interrogation. He agreed to confess because the police suggested that he might be able to plead to less than first-degree murder. He was also afraid that he would be beaten.

In contrast, several police officers testified that defendant was advised of his rights as he was being transported from Detroit to Livonia and before each

statement was given. They denied that defendant had ever requested an attorney. They also denied promising him a "deal" or threatening him. The trial court found the police officers' testimony to be more credible.

11

Subsequent to these statements, the police reinterrogated Michael White, who had repeatedly denied any involvement. Defendant was brought into the interrogation room to persuade White to confess. This interrogation session was tape recorded. White subsequently confessed to the murder after arraignment.

12

However, White's confession was suppressed as being coerced. Primarily on the basis of the recorded interrogation session of August 1, the trial court found that the police had ignored White's

requests for counsel and improperly offered plea bargains.

13

The Court of Appeals vacated defendant's conviction and sentence for conspiracy to commit second-degree murder because the crime could not logically exist. The court reasoned that defendant could not have conspired to commit a criminal act which by definition is committed without premeditation and deliberation. The prosecutor has not challenged this ruling on appeal to this Court.

14

Const 1963, art 1, § 17 provides in relevant part:

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without

> due process of law."

Const 1963, art 1, § 20 provides in relevant part:

> "In every criminal prosecution, the accused shall have the right... to have the assistance of counsel for his defense..."

15

Although Edwards arguably involved a statement obtained after judicial criminal proceedings had commenced, the Supreme Court specifically declined to address the Sixth Amendment question because the state court had not done so. Edwards, supra, 451 US 480, fn 7. Similarly, in Conklin (the companion case to Paintman), a confession was obtained seven days after the defendant requested counsel during his arraignment. See

Paintman, supra, 412 Mich 526. This Court did not discuss the Sixth Amendment ramifications of this request since Paintman and Conklin had also invoked their Fifth Amendment right to counsesl prior to arraignment.

Numerous courts have attempted to define what procedural requirements are sufficient to ensure that a defendant's waiver of his Sixth Amendment right to counsel is voluntary, knowing and intelligent. See cases cited in People v Green, (Levin, J., dissenting), 405 Mich 273, 302-304, and fns 5-8; 274 NW2d 448 (1979), and Note, Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel, 82 Colum L R 363, 369 fn 42 (1982). Some courts have held that a valid waiver of Miranda rights alone is sufficient, while other courts require

that the defendant be specifically informed of his Sixth Amendment rights by the police or a neutral magistrate. Some cases apparently have turned on the particular facts presented, e.g., whether the defendant or the police initiated the conversation which resulted in the confession, or whether the police were aware that defendant had been arraigned, had requested counsel, or had obtained counsel by the time the interrogation was conducted. Id.

Recent law review articles generally advocate that higher standards be implemented to safeguard the Sixth Amendment right to counsel. See, e.g., 82 Colum L R, supra, p 381 (defense counsel should be present when defendant waives his right to counsel); Note, Sixth Amendment Right to Counsel: Standards for Knowing

and Intelligent Pretrial Waivers, 60 Boston U L R 738, 762-764 (1980) (in addition to Miranda warnings, defendant must be told that he has been formally charged, the significance thereof, and how an attorney could assist him); Grano, Rhode Island v Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions, 17 Am Crim L R 1, 35 (1979) (police cannot elicit information from defendant unless they seek to notify counsel; if no attorney exists, defendant's waiver must meet the standards that govern waiver of the right to counsel at trial pursuant to Faretta v California, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 [1975]); cf. Constitutional Law--Right to Counsel, 49 Geo Washington L R 399, 409-410 (1981) (Miranda warnings sufficient unless defendant indicted before arrest). United States Supreme Court

Justice Thurgood Marshall has also consistently advocated a higher standard for waiver of the Sixth Amendment right to counsel. See Wyrick v Fields (Marshall, J., dissenting), 459 US 42, 54-55; 103 S Ct 394; 74 L Ed 2d 214 (1982), cert den after remand ___ US ___; 104 S Ct 556; 78 L Ed 2d 728 (1983).

16

Mohabir involved an indirect request for counsel to the arraigning magistrate. Before interrogation, defendant was advised several times of his Miranda rights, the nature of the charges against him, and the fact that he had been indicted. He was also given a copy of the indictment, but was not informed of the significance thereof. During interrogation, defendant was asked if he would need counsel appointed for arraignment. He replied affirmatively, but questioning

continued. The arraigning magistrate was informed of defendant's request and contacted an attorney to represent defendant.

17

The Mohabir Court refused to allow the prosecutor to give this advice since he is an adversary of the defendant. It postponed consideration of a third alternative, i.e., "outlawing" all statements made by an indicted defendant following an uncounseled waiver. The Court noted that such an approach could conflict with the defendant's constitutional right to represent himself under Faretta v California, supra. Mohabir, supra, 624 F2d 1151-1153.

18

The Court of Appeals relied primarily on Blasingame in concluding that Bladel and Jackson's post-arraignment statements

were admissible.

19

However, since the interrogation related to a criminal episode unrelated to the one on which defendant was arraigned and for which counsel was obtained, the Sparklin Court concluded that the confession was properly obtained. 672 p2d 1188.

20

Although the United States Supreme Court sidestepped this issue in Brewer, supra, 430 US 405-406, it suggested that a Sixth Amendment waiver is not precluded in Estelle v Smith, 451 US 454, 471, fn 16; 101 S Ct 1866; 68 L Ed 2d 359 (1981). Moreover, the Supreme Court has stated that the Sixth Amendment right to counsel may be waived at a post-indictment line-up. Wade, supra, 388 US 237. In addition, a defendant has a constitutional right to

waive the assistance of counsel at trial, as long as the trial court advises the defendant of the dangers and disadvantages of self-representation and the defendant knowingly and voluntarily waives his right to counsel. Faretta, supra, 422 US 835; People v Anderson, 398 Mich 361, 368; 247 NW2d 857 (1976).

21

See also 82 Colum L R, supra, pp 372-373.

22

We do not decide under what circumstances the police may interrogate a defendant who has not specifically requested appointed counsel at arraignment, or who has already consulted with counsel. We note only that these defendants must waive both their Fifth and Sixth Amendment rights to counsel before post-arraignment interrogation may proceed.

23

This rule is consistent with the result reached in People v Green, 405 Mich 273; 274 NW2d 448 (1979), since defendant there reinitiated further communications with the police. However, we do not suggest that the warnings given in Green are sufficient to effectuate a valid waiver of the Sixth Amendment right to counsel. That issue was not presented in Green and we need not decide it here.

24

Solem, supra, p 589; cf. Paintman, supra, 412 Mich 530-531.

25

On appeal to this Court, defendant does not challenge the trial court's findings that he was properly advised of his rights before each statement was given and that he never requested an attorney until arraignment. Our independent

review of the record does not disclose that these findings are clearly erroneous.

Since the trial court found the police officers to be more credible, the following discussion of the facts is based upon the officers' testimony at the Walker hearing.

26

However, our conclusion in no way condones the officers' actions. Defendant's first confession, when coupled with Knight's statement, presented more than enough evidence to arraign defendant for conspiracy and first-degree murder. The only purpose in recording defendant's statement was to strengthen the prosecution's case against him and his codefendants prior to arraignment. The result in

this case might have been different if the first oral statement had been obtained earlier in the day, if it had materially differed from the subsequent recorded statements, or if the recorded statements were the product of more intensive interrogation.

27

Plaintiff suggests that even if an unnecessary pre-arraignment delay occurred, the ultimate test for purposes of the exclusionary rule is whether the statement obtained was voluntary or coerced. See, e.g., People v Wallach, 110 Mich App 37, 59, fn 5; 312 NW2d 387 (1981), vacated and remanded on other grounds 417 Mich 937; 331 NW2d 730 (1983); People v Antonio Johnson, 85 Mich App 247, 252-253; 271 NW2d 177 (1978). Although earlier decisions of this Court could be interpreted in this manner, see e.g., People v

Farmer, 380 Mich 198; 156 NW2d 504 (1968); People v Ubbes, 374 Mich 571; 132 NW2d 669 (1965); People v Harper, 365 Mich 494; 113 NW2d 808 (1962); Hamilton, supra, an examination of White, supra, 392 Mich 424-425, reveals that this Court now treats the question of pre-arraignment delay apart from the issue of voluntariness. If voluntariness were the only relevant inquiry, there would be no reason to analyze whether a pre-arraignment delay occurred and was used as a tool, since involuntary statements have always been held inadmissible regardless of when they are obtained. Prompt arraignment serves several important functions apart from preventing improper custodial interrogations. See Mallory, supra, ___ Mich ___ (slip op, p 5).

28

A review of the police officers' test-

imony reveals that if any threats or promises were made to defendant, they occurred after the second taped statement. Sergeant Ericson testified that he told defendant after the second taped statement that the police were primarily after Ms. Perry. Leniency was not mentioned until after the post-arraignment statement. Sergeant Garrison stated that defendant may have mentioned not wanting to go to jail on July 31, but he was informed that the police could not authorize pleas to less serious offenses. Sergeant Hoff testified that no one discussed pleas on July 31. He did mention the possibility of a plea to second-degree murder if defendant cooperated and if the prosecutor agreed. However, this discussion occurred after the polygraph examination.

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 69615

ROBERT BERNARD JACKSON,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

RYAN, J. (concurring in part and dissenting in part).

I concur in part III-C of my brother Cavanagh's opinion with the exception, however, that since the Edwards/Paintman ruling derives from an analysis of the United States Constitution, I find it unnecessary and, indeed, inappropriate to base the result in these cases upon Const 1963, art 1, §20.

I do not agree, however, that the record in this case supports my brother's conclusion that the "post-polygraph" statements given by defendant Jackson are inadmissible for the reason stated. In my judgment, it is mere appellate speculation to conclude that the failure to arraign defendant Jackson during the morning of August 1 was "unnecessary pre-arraignment delay and that the delay was employed as a tool to extract these statements." That conclusion carries with it the implicit charge that the Livonia police contrived to lawlessly delay the defendant's arraignment on the mere pretext of completing unnecessary "paperwork," but for the actual purpose of extracting more confessions from him knowing that procedure to be improper. In my judgment, that conclusion is unsupported in the record.

This Court's opinion at this appellate remove, four and one-half years after the event, that the Livonia police may have had enough evidence at 9:30 a.m. on the morning of August 1 to obtain a recommendation for a warrant from an assistant Wayne County Prosecuting attorney, and in turn to obtain an arrest warrant from a district judge, without benefit of further interrogation of Jackson, might be correct. If so, the conclusion that it was unnecessary to delay defendant Jackson's arraignment until the afternoon might likewise be correct. It does not follow therefrom, however, that the decision of the Livonia police to proceed with the preparation of a 36-page warrant request, to conduct a polygraph examination to which the defendant Jackson had agreed the night before, and to question Jackson following the failed polygraph

examination, decisively demonstrate that the officers unnecessarily delayed arraigning Jackson as a ruse to "extract the post-polygraph statements." It is equally plausible, on the record before us, that the officers honestly believed that they were insufficiently prepared to request and obtain a warrant in this major "murder for hire" case until the statutorily required warrant request was properly completed and approved, the previously scheduled polygraph examination was completed, and the defendant was afforded the opportunity to reconcile, if he wished to, the conflicts it revealed. See United States v Lovasco, 431 US 783, 791; 97 S Ct 2044; 52 L Ed 2d 752 (1977) ("[P]rosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt

beyond a reasonable doubt").

/s/ James L. Ryan

/s/ James H. Brickley

S T A T E O F M I C H I G A N

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 69615

ROBERT BERNARD JACKSON,

Defendant-Appellant.

BOYLE, J. (dissenting).

In People v Jackson, I concur with the part of Justice Ryan's opinion regarding the post-polygraph statements. I would also find that appellant Jackson's post-arraignment statement, which it is undisputed was a repetition of the verbal and written statement given on August 1 in which the defendant confessed that he was the shooter, was, in light of the overwhelming evidence, if error, harmless

beyond a reasonable doubt. Chapman v California, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). I would find in People v Bladel that the Sixth Amendment right to counsel, which the people concede had attached, was waived. Brewer v Williams, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977), itself permits waiver. In concluding that waiver did not occur, Justice Stewart for the majority noted, "The Court of Appeals did not hold, nor do we, that under the circumstances of this case, Williams could not, without notice to counsel have waived his rights under the Sixth and Fourteenth Amendments." Id., pp 405-406. Justice Stewart further emphasized that the detective "did not preface this effort [to elicit a response] by telling Williams that he had a right to the

presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right." 430 US 405. In Bladel it is clear that when the defendant mentioned he had asked for an appointed attorney he was asked if he wanted an attorney present and the defendant stated that he did not need one. I would find an intentional relinquishment of a known right.

While I recognize both the importance of the Sixth Amendment right to counsel and the appeal of the symmetrical application of Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), and People v Paintman, 412 Mich 518; 315 NW2d 418 (1982), I am convinced without further guidance from the United States Supreme Court that we are consti-

tutionally obligated to reach this result.

/s/ Patricia J. Boyle